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Federal Communications Commission
Office of Secretary

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

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CC Docket No. 95-116

Telephone Number Portability

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RM 8535

**PETITION FOR FURTHER RECONSIDERATION OF
KMC TELECOM, INC.**

KMC Telecom, Inc. ("KMC"), by its undersigned counsel and pursuant to Section 1.429 of the Commission's rules, submits this Petition for Further Reconsideration of the Commission's First Memorandum and Order on Reconsideration ("Reconsideration Order"), released March 11, 1997, and published in the Federal Register April 15, 1997, in which the Commission modified in certain respects the implementation schedule for number portability.

I. INTRODUCTION AND SUMMARY

In its First Report and Order released July 2, 1996 ("First Report and Order"), the Commission required the LECs to implement number portability on all switches in the 100 largest metropolitan statistical areas ("MSAs"), in a five-phase sequence ending Dec., 1998, deferring implementation of number portability outside the top 100 MSAs until 1999. The Reconsideration Order, among other changes, modified the schedule for the top 100 MSAs by

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requiring number portability only for those switches within the top 100 MSAs for which another carrier has made a specific request. The Commission pointed out that this modification made it “likely” that the LECs’ implementation obligation will be “significantly lighter.”

Reconsideration Order ¶ 88. The Reconsideration Order, however, did not change the Commission’s initial finding that vendors had the capability to support implementation of number portability for all switches in the top 100 MSAs. Accordingly, the Reconsideration Order raised for the first time the distinct likelihood that requests for number portability might cover substantially fewer than all the switches in the top 100 MSAs and thus leave significant unused vendor capacity. This Petition proposes a procedure by which that unused vendor capacity, if it develops, could be utilized efficiently for providing number portability to specific, discrete switches outside the top 100 MSAs where there is market demand for number portability, thus bringing the benefits of effective competition to less densely populated areas of the country.

Specifically, the Reconsideration Order now provides that carriers at any time may request the provision of number portability in switches outside the 100 top MSAs, but that the time for incumbent providers to comply with such requests does not run until after the deadline of Dec. 31, 1998, for deployment of number portability in the top 100 MSAs. In this Petition, KMC proposes that the time for compliance with requests outside the top 100 MSAs should run from the date of the request if the request is made after Nov. 1, 1997, unless (for requests made before Dec. 31, 1998) the LEC obtains a statement from the vendor that, based on the orders it has received to date, it does not have sufficient additional capacity to accommodate the request. The same opportunity to obtain number portability ahead of schedule, where vendor capacity

exists, should also be accorded to carriers within the top 100 MSAs and presently relegated to Phases IV and V of the implementation schedule.

The rationale for this proposal is that, by Nov. 1, 1997, it should be apparent whether the initial requests for number portability within the top 100 MSAs are running at a level that leaves the vendors with unused capacity. (The deadline for initial requests for the first three phases of the five-phase schedule for the top 100 MSAs expires September 30, 1997.) If, at that point, excess vendor capacity exists, there is absolutely no reason why it should not be made available for utilization outside the 100 top MSAs, in areas where a competing carrier is ready to provide service. If, despite the existence of adequate vendor capacity, the LEC itself believes it does not have the capability to meet the deadline, it may utilize the waiver procedure established by the First Report and Order ¶ 85 and § 52.23(e). Where vendor capacity exists and the LEC is capable of complying with a request for number portability, there should be no barrier to effective competition in any area of the country, and users in smaller markets should not be treated as second-class citizens in relation to users located in larger markets.

II. ANALYSIS

A. A Petition for Further Reconsideration Is Appropriate under the Commission's Rules.

Under Section 1.429(i) of the Commission's Rules, an order disposing of a petition for reconsideration which modifies the rules initially adopted is subject to further reconsideration "to the extent of such modification." In this Petition, KMC asks for reconsideration only to the limited extent that the Reconsideration Order's modification of the number portability rules has

created the distinct likelihood of excess vendor capacity before the present deadline of Dec. 31, 1998 for the top 100 MSAs, enabling implementation beyond the top 100 MSAs earlier than otherwise. The Petition requests further reconsideration only to the extent that the modification has created the likelihood of such excess capacity. Under Rule 1.429(i), an order on reconsideration is subject to further reconsideration to the extent that it has changed the “underlying premise” of the original order. Amendment of Part 73 etc., 7 FCC Rcd 2954 (1992). In this case, the “underlying premise” of the original schedule was that number portability would be implemented for every switch in every one of the top 100 MSAs, irrespective of carrier demand or the switch’s location or function within those geographical areas. To the extent that the Reconsideration Order materially modified that underlying premise by requiring number portability only for switches for which it is requested, the Order is subject to further reconsideration under Rule 1.429(i).

B. The Petition Should Be Granted

1. The Commission Must Further Amend the Rule to Take Into Account the Fact That, As Modified on Reconsideration, It Creates the Likelihood of Unused Vendor Capacity.

As the rule was initially promulgated, the LECs were required to implement number portability by the end of 1998 with respect to all switches within the top 100 MSAs. First Report and Order § 52.3(b). That was based on AT&T’s proposed schedule, which estimated that the major switch manufacturers collectively have the capacity to update switch software at a total rate of 53 switches per week. First Report and Order ¶ 77; AT&T Ex Parte Letter of April 25, 1996. atch. 1; AT&T Comments of March 29, 1996 at 8 n. 14. Based on those figures, the

Commission found that schedule “workable” and prescribed a phased implementation for the top 100 MSAs, spreading implementation over a period of 15 months to “allow a reasonable amount of time to install the appropriate generic and application software in the relevant switches.” First Report and Order ¶¶ 77, 81.

In its Reconsideration Order, the Commission extended the time for implementation in Phases I and II of the top 100 MSAs, on the ground that “initial implementation of this new number portability technology is likely to require more time than subsequent deployment once the technology has been thoroughly tested and used in a live environment.” Reconsideration Order ¶ 78; see also ¶ 84. But the Commission left intact the original 15-month period for phased implementation in the top 100 MSAs and left untouched the estimate, on which it had initially relied, of vendor capability collectively to support updates at the rate of 53 switches per week.

At the same time, the Commission confined the LECs’ obligation within the top 100 MSAs to only those switches for which they receive a specific request, in order to allow the LECs “to target their resources where number portability is needed.” Reconsideration Order ¶ 59. The Commission pointed out in light of this modification the implementation obligations imposed by the regulation “are likely to be significantly lighter.” Reconsideration Order ¶ 88.

If, in fact, as the Commission rationally concluded, the burden of implementing number portability actually turns out to be “significantly lighter” than the estimates of vendor capacity underlying the original implementation schedule, the Commission must adjust the schedule. Section 251(b) of the Act requires LECs to provide number portability “to the extent technically feasible . . . in accordance with requirements prescribed by the Commission.” The

implementation obligation as modified by the Reconsideration Order is likely to be “significantly lighter” than the obligation which the Commission found to be technically feasible. Unless the implementation schedule is modified accordingly, the rule is defective because it does not require the LECs to provide number portability “to the extent technically feasible,” as required by Section 251(b), and as a result discriminates against less densely populated areas of the country in violation of the policy of the Act to provide such areas “reasonably comparable” service. See Section 254(b)(3).

2. The Commission Should Adopt a Procedure To Allow Areas Outside the Top 100 MSAs To Take Advantage of any Unused Vendor Capacity that May Develop Because Fewer Than All Switches Within the Top 100 MSAs are the Subject of Number Portability Requests.

KMC’s proposed procedure would not take effect until Nov. 1, 1997. September 30, 1997, is the deadline for initial requests for number portability for the third phase of the five-phase implementation schedule for the top 100 MSAs. By Nov. 1, 1997, based on orders received for the first three phases (plus whatever orders have come in early for the remaining two), the vendors should know whether the gap between the number of requests for updates and the total number of switches is large enough to free up some of their capacity. If, at that point, a vendor believes it has sufficient capacity to accommodate a request for number portability outside the top 100 MSAs, there is absolutely no reason for that capacity to remain idle. Under the KMC procedure, the LEC would be required to implement any request made after Nov. 1, 1997 within the schedule provided by § 52.23(b)(2)(iv) of the present Rule, unless (for requests made before Dec. 31, 1998) the LEC obtains a statement from the switch vendor that, based on the orders it has received to date, it does not have the additional capability to support the request.

The right to make such a request, subject to a statement from the switch vendor that it does not have the additional capability, should also be granted to competitive carriers in the MSAs listed in Phases IV and V of the present schedule.

To be sure, there might be a chance that the pace of requests would accelerate for the latter two phases of the top MSAs, or that belated requests will come in for the first three phases. But vendor capacity should not stand idle to accommodate possible future requests from the top 100 MSAs, at a time when a competing carrier is presently ready to request portability and provide effective competition in other areas. The Act expresses a Congressional policy that consumers in all regions of the country should have access to telecommunications services “reasonably comparable to those provided in urban areas.” Section 254(b)(3). Effective competition is a key element of comparability, and “Congress has recognized that number portability will lower barriers to entry and promote competition in the local exchange marketplace.” First Report and Order ¶ 2. It would be gross and unlawful discrimination against consumers outside the top 100 MSAs to deny them the benefits of a key element of competitive telecommunications service, where a competing carrier stands ready to provide it and vendor capacity to install number portability is available.

KMC’s own situation is illustrative of the problem created by the present schedule for implementation of number portability. KMC is targeting several areas outside the top 100 MSAs which it believes are ready for competitive telecommunications services. Two such areas are Shreveport, Louisiana and Corpus Christi, Texas. In addition, KMC is targeting Baton Rouge, Louisiana, in Phase V of the present schedule. These are areas with significant commercial, industrial, medical, academic and governmental customers. They are much more

suitable candidates for competitive service than, for example, some areas within the New Orleans MSA, in Phase III of the present schedule.¹ If vendor capacity is available, it makes no sense to keep that capacity in reserve for the outer areas of the New Orleans MSA (presently entitled to the Phase III implementation dates of April 1 to June 30, 1998), while number portability is delayed until December 31, 1998 for Baton Rouge, and June 30, 1999 for Shreveport and Corpus Christi.

The LECs will presumably argue that there might be situations in which there are limiting factors other than vendor capacity, rendering some early upgrades infeasible. That seems improbable, since the Commission's findings with respect to technical feasibility focused on vendor capability as the principal limiting factor. First Report and Order ¶¶ 77, 81. Moreover, to the extent that the burden on carriers is a limiting factor, there is every reason to believe that, as vendor burdens have been lightened by the Reconsideration Order's modification, so too have carrier burdens lightened.

In any event, the rules establish a waiver procedure, under which the LEC can demonstrate that it cannot meet the deadline for a particular switch. First Report and Order ¶ 85 and § 52.3(e). That should suffice for any situations in which, for whatever reason, the vendor has the capability to support a particular request but the carrier does not.² Moreover, the demand

¹ The New Orleans MSA extends approximately 60 miles to the southeast of the city, and approximately 50 miles to the west and 40 miles to the north.

² In the First Report and Order, the Commission stated that "the burden on [carriers serving multiple regions] should be less than that upon carriers in smaller markets because the latter may be required to undertake hardware upgrades whereas large carriers may already have upgraded their switches." First Report and Order ¶ 81. However, many areas outside the top 100 MSAs and in Phases IV and V are served by large regional carriers. For example, Bell South serves Shreveport and Baton Rouge, while Southwestern Bell serves Corpus Christi. If the state

outside the top 100 MSAs, while significant to competition, is not likely to result in requests for a large number of switches. For this reason as well, it seems unlikely that requests for number portability, if adequate vendor capacity is available, will exceed the carrier capacity that has been made available by the Commission's decision in its Reconsideration Order to lighten the carriers' obligations.

In sum, KMC requests the Commission to modify the Rule to provide that the time for compliance with requests outside the top 100 MSAs runs from the date of the request if the request is made after Nov. 1, 1997, unless (for requests made before Dec. 31, 1998) the LEC obtains a statement from the switch vendor that, based on the orders it has received to date, it does not have sufficient additional capacity to accommodate the request. In addition, the Rule should provide that competitive carriers seeking number portability in MSAs within Phases IV and V may make similar requests after Nov. 1, 1997 unless (for requests made before the present date for requests within those MSAs) the LEC obtains such a statement from the switch vendor. Such a modification is consistent with the Commission's findings of technical feasibility, and is necessary to insure that consumers outside the top 100 MSAs obtain the benefits of competitive service whenever there is a carrier ready to compete and the capacity to implement number portability exists.

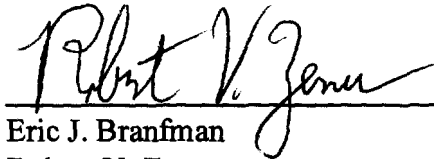
III. CONCLUSION

The present schedule for implementation of number portability puts areas outside the top

of the hardware in a particular area is such as to preclude acceleration of the present schedule, that would be a basis for the LEC to file a waiver request.

100 MSAs at the back of the line. Yet the order as modified on reconsideration creates a significant possibility that the technical capability will exist to end this discrimination against less densely populated areas of the country. This Petition proposes a procedure for utilizing unused technical capability and thus bringing the full benefits of competitive telecommunications service to all areas of the country where competitive carriers stand ready to provide service. The Petition should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Robert V. Zener", is written over a horizontal line.

Eric J. Branfman

Robert V. Zener

SWIDLER & BERLIN, Chartered

3000 K Street, N.W., Suite 300

Washington, D.C. 20007-5116

202-424-7500

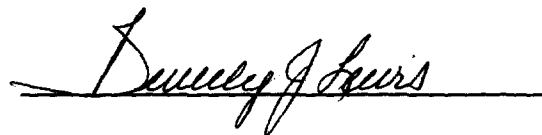
Fax 202-424-7643

Attorneys for KMC Telecom, Inc.

May 8, 1997

Certificate of Service

I hereby certify that copies of the foregoing PETITION FOR FURTHER RECONSIDERATION OF KMC TELECOM, INC. in Docket No. 95-116 were served this 8th day of May, 1997, by first class mail, postage prepaid, to each on the attached service list.
(Those served by hand delivery are marked with an asterisk (*).)

A handwritten signature in cursive script, reading "Doreen J. Lewis", is written over a horizontal line.

Secretary*
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

International Transcription Service*
1919 M Street, N.W., Room 246
Washington, DC 20554

Wendy C. Chow
Michael Altschul
Randall S. Coleman
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, N.W., Room 200
Washington, DC 20036

Dennis C. Brown
Small Business In Telecommunications, Inc.
1835 K Street, N.W., Suite 650
Washington, DC 20006

David L. Meier, Director
Cincinnati Bell Telephone
201 E. Fourth Street
P.O. Box 2301
Cincinnati, OH 45201-2301

Mark D. Roellig
Dan L. Poole
Jeffrey S. Bork
US West
1020 - 19th Street, N.W., Suite 700
Washington, DC 20036

Michael S. Fox, Director
John Staurulakis, Inc.
Telecommunications Consultant
6315 Seabrook Road
Seabrook, MD 20706

Marlin D. Ard
Nancy C. Woolf
Pacific Telesis Group
140 New Montgomery Street, Room 1523
San Francisco, CA 94105

M. Robert Sutherland
Theodore R. Kingsley
BellSouth Corporation
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610

James D. Ellis
Robert M. Lynch
David F. Brown
SBC Communications, Inc.
175 E. Houston, Room 1254
San Antonio, TX 78205

Durward D. Dupre
Mark W. Marks
Southwestern Bell Telephone Company
One Bell Center, Room 3558
St. Louis, MO 63101

Bruce Beard
Southwestern Bell Mobile Systems
17330 Preston Road, Suite 100A
Dallas, TX 75252

John M. Goodman
Bell Atlantic
1133 - 20th Street, N.W.
Washington, DC 20036

John T. Scott, III
(Attorneys for Bell Atlantic NYNEX Mobile, Inc.)
Crowell & Moring, L.L.P.
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

Robert S. Foosaner
Senior Vice President Government Affairs
Nextel Communications, Inc.
800 Connecticut Avenue, N.W., Suite 1001
Washington, DC 20006

Jill Lyon, Director of Regulatory Relations
American Mobile Telecommunications
Association, Inc.
1150 - 18th Street, N.W., Suite 250
Washington, DC 20036

David J. Gudino
HQE3F05
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015-2092

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, DC 20036

Wendy C. Chow
Michael Altschul
Randall S. Coleman
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, N.W., Suite 200
Washington, DC 20036

Richard L. Cys
Davis Wright Tremaine
(Attorneys for NEXTLINK)
1155 Connecticut Avenue, N.W., Suite 700
Washington, DC 20036

Mary McDermott
Linda Kent
Charles D. Cosson
Keith Townsend
U.S. Telephone Association
1401 H Street, N.W., Suite 600
Washington, DC 20005

Lisa M. Zaina
Stuart Polikoff
OPASTCO
21 Dupont Circle, N.W., Suite 700
Washington, DC 20036

David A. Gross
Kathleen Q. Abernathy
AirTouch Communications, Inc.
1818 N Street, N.W., Suite 800
Washington, DC 20036

Charles V. Gerkin, Jr.
(Attorneys for AirTouch Communications, Inc.)
Chorey, Taylor & Feli, P.C.
3399 Peachtree Road, N.E., Suite 1700
Atlanta, GA 30326

Perry S. Goldschein, Regulatory Manager
National Exchange Carrier Association, Inc.
2300 N Street, N.W., Suite 600
Washington, DC 20037

Donald J. Elardo
Larry A. Blosser
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, DC 20006

Stephen P. Bowen
(Attorneys for MCI)
Blumenfeld & Cohen
101 California Street, 42nd Floor
San Francisco, CA 94111

Mark Stachiw
AirTouch Paging
Three Forest Plaza
12221 Merit Drive, Suite 800
Dallas, TX 75251

(2 copies)
Carl W. Northrop
E. Ashton Johnston
Paul, Hastings, Janofsky & Walker
10th Floor
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004-2400

Dave Baker
Georgia Public Service Commission
244 Washington Street, S.W.
Atlanta, GA 30334-5701

Werner K. Hartenberger
J. G. Harrington
Laura H. Phillips
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W., Suite 800
Washington, DC 20036-6802

James R. Hobson
Donelan, Cleary, Wood & Maser, PC
1100 New York Avenue, N.W., Suite 750
Washington, DC 20005-3934

Paul Rodgers
Charles D. Gray
James Bradford Ramsay
NARUC
1102 ICC Building
P. O. Box 684
Washington, DC 20044

Richard J. Metzger
Association for Local
Telecommunications Services
1200 - 19th Street, N.W., Suite 560
Washington, DC 20036

Edwin N. Lavergne
Darren L. Nunn
Ginsburg, Feldman & Bress, Chartered
1250 Connecticut Avenue, N.W.
8th Floor
Washington, DC 20036

Gene P. Belardi
MobileMedia Communications, Inc.
2101 Wilson Boulevard, Suite 935
Arlington, VA 22201

Neal M. Goldberg
David L. Nicoll
National Cable Television Association, Inc.
1724 Massachusetts Avenue, N.W.
Washington, DC 20036

(3 Copies)
R. Michael Senkowski
Jeffrey S. Linder
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006

Larry A. Peck
Frank Michael Panek
Ameritech Operating Companies
Room 4H86
200 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025

Mark C. Rosenblum
Roy E. Hoffinger
Clifford K. Williams
AT&T Corp.
295 North Maple Avenue, Room 3244J1
Basking Ridge, NJ 07920

Donna N. Lampert
Charon J. Harris
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo
701 Pennsylvania Avenue, N.W., Suite 900
Washington, DC 20004

Leon M. Kestenbaum
Jay C. Keithley
Norina T. Moy
Spring Communications Company, Inc.
1850 M Street, N.W., Suite 1100
Washington, DC 20036

Deborah Haraldson
NYNEX Corporation
1095 Avenue of the Americas
New York, NY 10036

Alan J. Gardner
Jerry Yanowitz
Jeffrey Sinsheimer
Jennifer A. Jones
California Cable Television Association
4341 Piedmont Avenue
Oakland, CA 94611

Mark J. Tauber
Mark J. O'Connor
Piper & Marbury, LLP
7th Floor
1200 - 19th Street, N.W.
Washington, DC 20036

David N. Porter *
MFS Communications Company, Inc.
Suite 300
3000 K Street, N.W.
Washington, DC 20007

Eric Witte
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

David Cosson
L. Marie Guillory
National Telephone Cooperative Association
2626 Pennsylvania Avenue, N.W.
Washington, DC 20037

David A. Irwin
Irwin, Campbell & Tannenwald, PC
1730 Rhode Island Avenue, N.W.
Washington, DC 20036-1811

Susan Drombetta
Scherers Communications Group, Inc.
575 Scherers Court
Worthington, OH 43085

James S. Blaszak
Levine, Blaszak, Block and Boothby
1300 Connecticut Avenue, N.W., Suite 500
Washington, DC 20036-1703

Lee L. Selwyn
Jennifer A. Johns
Economics and Technology, Inc.
One Washington Mall
Boston, MA 02108-2603

Mark J. Golden
Robert L. Hoggarth
Personal Communications Industry Association
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

Maureen O. Helmer
John Starrs
New York State Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Christopher J. Wilson
Frost & Jacobs
2500 Central Trust Center
201 East Fifth Street
Cincinnati, OH 45202

Thomas E. Taylor
Frost & Jacobs
6th Floor
201 East Fourth Street
Cincinnati, OH 45202

Cynthia Miller
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Robert C. Mackinchan, Jr.
Vincent L. Crivella
Michael J. Ettner
Jody B. Burton
General Services Administration
18th and F Streets, N.W., Room 4002
Washington, DC 20405

Betty D. Montgomery
Duane W. Luckey
Steven T. Nourse
Attorney General of Ohio
180 East Broad Street
Columbus, OH 43215-3793

Virginia J. Taylor
California Department of Consumer Affairs
400 R Street, Suite 3090
Sacramento, CA 95814-6200

Michael J. Shortley, III
Frontier Corporation
180 South Clinton Avenue
Rochester, NY 14646

Snavely, King, Majoros, O'Connor & Lee, Inc.
1220 L Street, N.W.
Washington, DC 20005

Campbell L. Ayling
NYNEX Corporation
1111 Westchester Avenue
White Plains, NY 10604

Peter Arth, Jr.
Edwin W. O'Neill
Mary Mack Adu
Public Utilities Commission
of the State of California
505 Van Ness Avenue
San Francisco, CA 94102

Teresa Marrero
L. Fredrik Cederqvist
Ed Gould
Teleport Communications Group, Inc.
Two Teleport Drive, Suite 300
Staten Island, NY 10311

Timothy R. Graham
Robert Berger
Joseph M. Sandri, Jr.
WinStar Communications, Inc.
1146 - 19th Street, N.W.
Washington, DC 20036

Anthony Marquez
Colorado Public Utilities Commission
Office Level 2
1580 Logan Street
Denver, CO 80203

Charles C. Hunter
Catherine M. Hannan
Hunter & Mow, PC
1620 I Street, N.W., Suite 701
Washington, DC 20006

Myra Karegianes
Illinois Commerce Commission
160 North LaSalle
Chicago, IL 60601-3104

Thorvald A. Nelson
Colorado Office of Consumer Council
1580 Logan Street, Suite 610
Denver, CO 80203

Lewis R. Cohen
John H. Harwood, II
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037-1420